



Comptroller General
of the United States
Washington, D.C. 20548

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Decision

Matter of: Adventure Tech, Inc.

File: B-253520

Date: September 29, 1993

Ronald K. Henry, Esq., Kaye, Scholer, Fierman, Hays & Handler, for the protester.
Fredrick M. Lewis, Esq., and Captain Gerald P. Kohns, Department of the Army, for the agency.
John L. Formica, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Specification in commercial item solicitation for rain jackets and trousers that requires, among other things, that the items be waterproof and moisture vapor permeable, and includes the commercial item warranty provision that requires, among other things, that the products be fit for the ordinary purposes for which the products are used and of a quality to pass without objection in the trade, adequately describes the products in terms of performance required and form, fit and function or essential physical characteristics.

DECISION

Adventure Tech, Inc. protests the terms of invitation for bids (IFB) No. DAKF23-93-B-0048, issued by the Department of the Army for lightweight rain jackets and trousers. Adventure Tech contends that the solicitation is vague and lacks sufficient information regarding the construction of the jackets and trousers to enable potential bidders to intelligently prepare their bids.

We deny the protest.

The IFB, issued on April 12, 1993, contemplates the award of a firm, fixed-price contract with six contract line items (CLIN). CLIN Nos. 0001 through 0003 are for "Light Weight Rain Jacket; Color: Camouflage Woodland Pattern" in sizes large, medium, and small, respectively; and CLIN Nos. 0004 through 0006 require "Light Weight Rain Trousers," in sizes large, medium, and small, respectively, with the same notation concerning color. The solicitation is limited to

"commercial items" as provided in Federal Acquisition Regulation (FAR) § 52.211-7012. As originally issued, the IFB specified that the jackets and trousers were to be constructed of "Gortex material."

In response to an agency-level protest contending that the IFB was overly restrictive because it specified that the jackets and trousers be made of Gortex fabric, the agency deleted that requirement by amendment No. 0001 to the IFB and added the following:

"Note: Line item [Nos.] 0001 through 0003 provide full length light weight rain jacket, camouflage woodland pattern, jacket shall be machine washable, waterproof, moisture vapor permeable, with a minimum of two front pockets with closures, elastic or velcro sleeves."

The amendment also set forth a similar notation applicable to CLIN Nos. 0004 through 0006. Further, the agency has incorporated into the IFB the standard warranty provision for commercial item acquisitions set forth at FAR § 52.246-17, Alternate I, and below in pertinent part:¹

"(1) Notwithstanding inspection and acceptance by the [g]overnment of supplies furnished under the contract or any condition of this contract concerning conclusiveness thereof, the Contractor warrants that for one (1) year all supplies furnished--

"(i) Are of quality to pass without objection in the trade under the contract description;

"(ii) Are fit for the ordinary purposes for which the supplies are used;

"(iii) Are within the variations permitted by the contract of an even kind, quality, and quantity within each unit and among all units;

"(iv) Are adequately contained, packaged, and marked as the contract may require; and

¹As issued, the IFB contained FAR § 52.246-18, the general warranty provision for noncomplex items, which excludes the implied warranty of merchantability, as opposed to FAR § 52.246-18, Alternate I, applicable to commercial item acquisitions which includes this warranty.

"(v) Conform to the promises or affirmations of fact made on the container."²

Adventure Tech protests that the IFB is unclear and precludes competition on an equal basis because it fails to provide any guidance as to the minimum standards for, among other things, "waterproofness," "moisture vapor permeability," and "durability." The protester also points out that the IFB fails to set forth any design and construction requirements, and questions whether the IFB is soliciting bids for "tailored military style jackets or shapeless poncho-type garments," as well as what constitutes small, medium, or large sizes.

The agency responds that the IFB requires that the successful bidder furnish "commercial items," that is, "items regularly used in the course of normal business operations," see Defense Federal Acquisition Regulation Supplement (DFARS) §§ 252.211.7000-7005, and that to define its needs further would unduly restrict competition.

The Congress has set forth as policy that Department of Defense (DOD) agencies and the National Aeronautics and Space Administration (NASA) shall "promote the use of commercial products whenever practicable." 10 U.S.C. § 2301(b)(6) (1988). This policy follows from Congress' determination that the acquisition of nondevelopmental/commercial items is desirable in order to achieve more cost effective procurement. S. Rep. No. 331, 99th Cong., 2d Sess. 265 (1986), reprinted in 1986 U.S.C.C.A.N. 6413, 6460; see H.R. Conf. Rep. No. 1001, 99th cong. 2d Sess. 279 (1986), reprinted in 1986 U.S.C.C.A.N. 6529, 6554. A key element of efforts to increase purchases of commercial products is stating requirements in broad functional or performance terms, rather than using detailed military specifications. Id. Thus, to the maximum extent practicable, DOD agencies are required to state their needs in functional or performance terms or essential physical

²This provision substantially mirrors Uniform Commercial Code § 2-314 "Implied Warranty; Merchantability; Usage of Trade."

characteristics and to satisfy their needs by the competitive acquisition of nondevelopmental/commercial items. 10 U.S.C. § 2325(a) (1988 & Supp. IV 1992); DFARS § 211.7004-1(d).³

This preference for broad product descriptions and nondevelopmental/commercial items is not inconsistent with, and thus does not relieve the DOD agency of, the obligation to specify its requirements in a manner designed to achieve full and open competition. 10 U.S.C. § 2305(a). That is, where an agency intends to acquire a commercial item, it is obligated to describe the item in a way that identifies the agency's needs with sufficient detail and clarity so that all vendors have a common understanding of what is required under the contract in order that they can compete intelligently on a relatively equal basis. See Interface Flooring Sys., Inc., B-225439, Mar. 4, 1987, 87-1 CPD ¶ 247; Worldwide Marine, Inc., B-212640, Feb. 7, 1984, 84-1 CPD ¶ 152; Amdahl Corp., et al., B-212018, et al., July 1, 1983, 83-2 CPD ¶ 51.

The protester claims that such terms as "waterproof", "moisture vapor permeable", and "small", "medium" and "large" have no standard definitions or accepted industry meaning, and could permit the supply of products that arguably possess a degree of waterproofing or moisture permeability and are in sizes unacceptable to the agency.

The Army asserts that the description represents its "actual minimum requirements." Apparently relying on the ordinary meanings of these terms, the Army emphasizes the protections afforded by the commercial item provisions included in the IFB. These provisions include the warranty applicable to commercial item acquisitions which requires, among other

³DFARS § 211.7004-1(d) states:

"Specification requirements.

Commercial items shall be acquired using specifications that describe the item in terms of performance required and form, fit and function or other essential physical characteristics. Specifications shall not include:

- (1) Specific designs, manufacturing processes or procedures; or
- (2) Military standards or military specifications which would restrict a potential contractor's ability to satisfy the [g]overnment's requirements."

things, that the supplies to be provided under the contract be "of quality to pass without objection in the trade under the contract description" and are "fit for the ordinary purpose for which the supplies are used."

As we understand the IFB, the agency has chosen to purchase off-the-shelf raingear rather than supplies designed around a government specification, briefly describing its needs in terms ordinarily used in the commercial marketplace. As the Army continues its efforts to promote the use of commercial products, it may conclude that this IFB does not represent the best approach to the procurement of raingear because of the apparent range of raingear that is available to be proposed. However, that is not the issue before us. The question we must address is whether the protester has established that vendors cannot compete intelligently or on a common basis for this contract because of the lack of specificity of the item description. We conclude the protester has not.

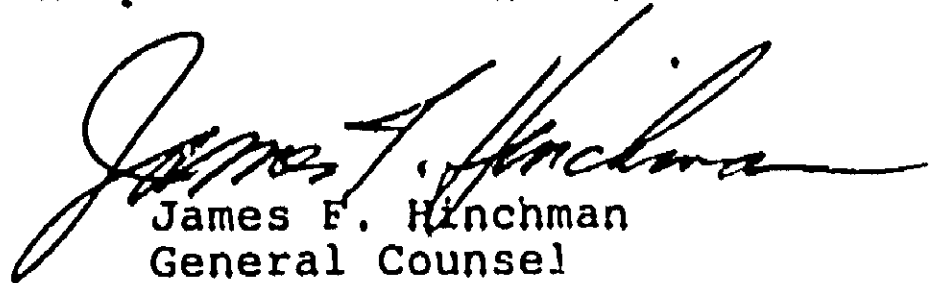
For example, the protester contends that the term "waterproof" is applied to a range of water permeability. We agree, but we do not agree that the protester would not know what products to offer as waterproof. Any product that is "of quality to pass without objection in the trade" as waterproof, meets the other requirements of the product description, and otherwise can satisfy the FAR § 52.246-17, Alternate I, warranty obligations, is acceptable under the IFB. The record reflects no reason why Adventure Tech and other potential bidders cannot submit bids for commercial raingear which meet these requirements.

Similarly, with respect to the protester's contentions that the product description fails to apprise bidders of requirements for moisture vapor permeability, durability, design and construction, pocket sizes, or sizes, Adventure Tech simply has not established that the description does not adequately inform bidders of the agency's needs. As illustrated above, the warranty required of the successful bidder, FAR § 52.246-17, Alternate I, addresses durability, and there is no evidence in the record that pockets, sizes, or design and construction vary to such an extent that prospective bidders do not know what commercial products would meet the agency's needs.

In sum, the agency's stated requirements are for rain jackets and trousers which "are of quality to pass without objection in the trade under the contract description" and are "fit for the ordinary purposes for which the supplies are used." Given the agency's discretion in defining its minimum needs, see Sturm, Ruger & Co., B-250555, Feb. 2, 1993, 93-1 CPD ¶ 92, and the DOD preference for acquiring commercial items, we cannot say that the agency did

not adequately state its requirements "in terms of performance required and form, fit and function." DEARS § 211.7004-1(d).

The protest is denied.



James F. Hinchman
General Counsel